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No. 1203

In the Supreme Court of the United States

OCTOBER TERM, 1969

IN RE DECEMBER 1968 GRAND JURY
JOHN DI DOMENICO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, John DiDomenico, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois entered August 14, 1969, finding the Petitioner in contempt of court and committing him to indefinite imprisonment.

OPINION BELOW

The opinion of the Court of Appeals issued January 20, 1970 is not yet reported, but is printed in the appendix attached to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has John DiDomenico, Petitioner, who is deprived of his liberty for an indefinite period of at least ten months on a finding of contempt for invoking his privilege under the Fifth Amendment after purportedly being granted immunity, been denied due process of law when he was not served with the entire petition to grant him immunity (he was never served with a copy of the letter purporting to be authority from the Attorney General to grant immunity), and where there is no written petition or rule to show cause for his "contempt", and where he has been denied an opportunity to obtain counsel prior to being incarcerated, and where he has not been allowed to examine the minutes of the grand jury, and where he is not allowed to defend the charge?

2. Is an order purporting to grant immunity pursuant to 18 U.S.C. 2514 a valid order when the immunity has not been authorized by the Attorney General as required by the statute?

(a) Is the power to authorize grants of immunity under 18 U.S.C. 2514 personal to the Attorney General and non-delegable?

(b) Can a delegation of authority by a prior Attorney General to his Assistant in charge of the Criminal Division be said to be a delegation of power by the present Attorney General to a different person acting as the Assistant Attorney General in charge of the Criminal Division?

(c) Must the Government prove to the District Court Judge that there is a valid delegation of power and a valid authorization of immunity under 18 U.S.C. 2514?

3. Is 18 U.S.C. 2514 unconstitutional as in derogation of the First, Fifth, Ninth and Tenth Amendments?

4. Was the Petitioner denied his right to assistance of counsel?

5. Is John DiDomenico, incarcerated for contempt for invoking his privilege under the Fifth Amendment after purportedly being granted immunity, being punitively imprisoned when the Grand Jury involved has already returned its indictment in the investigation in which he was subpoenaed?

(a) Has John DiDomenico suffered imprisonment and loss of liberty in excess of six months without benefit of trial by jury contrary to the Constitution?

(b) Has John DiDomenico suffered imprisonment and loss of liberty in excess of six months without charge by indictment of a Grand Jury contrary to the Constitution?

(c) Has John DiDomenico suffered imprisonment and loss of liberty amounting to cruel and unusual punishment?

6. Does not the plan by which the prosecutor and District Court Judge punitively imprisoned the petitioner for the life of the Grand Jury, in this case, possibly in excess of ten months, escape the decision limitation of punishment for contempt without a trial by jury to six months (*Bloom* v. *Illinois*, 391 U.S. 194), and thus amount to a scheme to deprive the petitioner of due process, a fair trial and the right to trial by jury?

7. Should not this Court review and determine whether the sentence or effective punishment should be at the whim of a prosecutor by dependence on when the action is brought, and should this matter of dependence of punishment on the unexpired length of the Grand Jury term be based on a Federal Rule of Criminal Procedure, which said Rule was not enacted by Congress and which said Rule was never subject to the Constitutional safeguard of Presidential veto?

STATUTES INVOLVED

18 U.S.C. § 2514 Immunity of witnesses

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfei-

ture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

18 U.S.C. § 2516 Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contents), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations, section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats of violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

STATEMENT OF THE CASE

In December, 1968, the Petitioner, John DiDomenico, was summoned before the December, 1968 Federal Grand Jury which was then investigating possible violations of "18 U.S.C. 1952 by Jack Cerone, et al". The Petitioner appeared as required and invoked his privilege against self-incrimination under the Fifth Amendment. He was subsequently excused. (R. 11, p. 9, A. 11)

On February 6, 1969, the December, 1968 Grand Jury returned indictment number 69 CR 63 charging John Cerone, Frank Aureli, and Don Angelini with violations of Title 18, Section 1952 of the United States Code.

Subsequently during the week of August 4, 1969, one of the Petitioner's attorneys, Mr. Harman*, was informed by an agent of the Federal Bureau of Investigation that the Petitioner's presence was again desired before the Grand Jury. Shortly thereafter, the Petitioner informed the agent of his location in Florida and that he would be available for service of subpoena. He was shortly thereafter served with a subpoena calling for his appearance on August 13, 1969. No witness fees nor travel expenses were advanced.

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* Contrary to the Court of Appeals' holding, Mr. Harman never represented nor advised the petitioner in this matter prior to the petitioner's incarceration. Further, although Mr. Harman's name appeared on the pleadings in this matter after the petitioner's incarceration, Mr. Harman did not take any active part in representing the petitioner.

Mr. Harman is a semi-retired attorney whose practice never encompassed "criminal" matters and particularly Federal criminal matters.

He happened to be a family friend of the petitioner's and was the person who transmitted the F.B.I.'s request that the petitioner accept service of a subpoena. He did not counsel nor advise the petitioner on the matter.

The Petitioner then at his own expense undertook to get to Chicago and did appear before the December, 1968 Grand Jury on August 13, 1969. The Petitioner was then questioned with regards to gambling activities, and in particular, whether he knew or associated with one Louis Bombacino. (Louis Bombacino is an alleged unindicted co-conspirator in indictment 69 CR 63 mentioned above.) The Petitioner invoked his privilege against self-incrimination to all questions asked. The Petitioner was instructed to return the next morning, August 14, 1969. At that time, he was taken before Chief Judge William J. Campbell, where the United States Attorney presented a petition to grant the Petitioner immunity under Section 2514 of Title 18, United States Code (R. 3, 6, pp. 3-4, A. 1-2). Attached to the petition filed with the Court was a letter from Will Wilson, Assistant Attorney General, purporting to authorize the seeking of the immunity as being "necessary and in the public interest" . . . "in connection with the (December, 1968) Federal Grand Jury investigation of possible violations of 18 U.S.C. 1952 by Jack Cerone, et al., (R. 3, A. 3). However, the Petitioner John Di Domenico, was only served with a poor quality carbon copy of the petition, and the letter referred to was not attached. DiDomenico was not served with an essential part of the petition.

Judge Campbell signed an order purporting to grant the Petitioner immunity and instructed him to return to the Grand Jury and answer questions (R. 4, 6, p. 15, A. 4). The Petitioner did return and again invoked his privilege against self incrimination (R. 6, p. 2, A. 6).

The Petitioner was then returned before Judge Campbell, and on oral request by an Assistant United States Attorney to cite the Petitioner for contempt of Court,

Judge Campbell found the Petitioner in contempt of Court and ordered him incarcerated to what is in effect indefinite imprisonment (R. 6, pp. 2-9, A. 6-11).

At the time of the oral request to find the Petitioner in contempt, the Grand Jury was present in Court and the reporter who had been in the grand jury read the questions to the Petitioner into the record. However, *no written* petition to cite the Petitioner for contempt was ever filed or served upon the Petitioner. Further, at that time the Petitioner had not been allowed to see the grand jury minutes of his testimony, and no written certification of the questions asked him was ever made (R. 8, A. 2).

Also at this time, the Appellant had not been represented by counsel, nor had he consulted any counsel.

When the Assistant United States Attorney asked that the Appellant be held in contempt, the following took place:

> "Mr. DiDomenico: Your Honor, up until this—recently I felt I was not in need of an attorney. Consequently I am without counsel. I have been advised I was able to secure one but I did not feel—I feel that I must confer with an attorney.
>
> "The Court: Well, you may confer with him in the Marshal's office, but you have—
>
> "The Witness: I don't have one at this time, your Honor. I would like to request some time to obtain his services.
>
> "The Court: You were fully advised by the Court of the nature of the matter before you, you were fully granted immunity. You heard the attorney for the other three witnesses make his presentation to the Court and you heard the same immunity granted to them. Obviously they have decided to follow the law and accept the immunity that has been granted to them by the Act of Congress and go ahead and testify.

> Now for the first time you say you must consult an attorney. Full opportunity was given to you before and you refused to use it. Now you say you need an attorney. Now I tell you that unless you go back to the Grand Jury and fully and completely answer these questions—you may still see your attorney but you will see him in the custody of the Marshal.
>
> "Are you prepared now to go back and answer the questions?" (R. 6, pp. 7-8, A. 20-21)

The Appellant was then incarcerated.

On August 15, 1969, the Appellant made motions for production of the petition to cite him for contempt, for production of the United States Attorney's letter to the Attorney General seeking authorization to seek immunity, for production of the grand jury minutes, for bail, and to vacate the order of commitment and for rehearing (R. 7, 8, 9, and 10, A. 5-6, 22, 23).

The Petitioner then filed his notice of Appeal on August 18, 1969 (R. 12, A. 6).

On August 19, 1969, the December, 1968 Grand Jury returned its superseding indictment No. 69 CR 555 charging Jack Cerone and five other persons with violations of 18 U.S.C. 1952, thus terminating the need or necessity for the Petitioner's testimony as shown in the Assistant Attorney General's letter of August 12, 1969 (R. 3, A. 3).

However, the Petitioner remains incarcerated without bail to date.

REASONS FOR GRANTING THE WRIT

I.

JOHN DI DOMENICO HAS BEEN DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

On August 14, 1969, John DiDomenico was ordered indefinitely incarcerated for purportedly being in civil contempt of Court by Judge William J. Campbell. Thus, John DiDomenico lost his liberty, his most precious possession next to life itself, without as it is argued, being given the due process of law guaranteed to him by the Fifth Amendment to the Constitution of the United States.

The record shows that at no time prior to his incarceration was John DiDomenico represented by counsel nor did he have the benefit of advice of counsel (R. 6, p. 8, A. 10).

The record shows that John DiDomenico was subpoenaed to appear before the December, 1968 Grand Jury for the second time on August 13, 1969. John DiDomenico appeared at that time and invoked his privilege against self-incrimination. He was then instructed to return the next day on August 14, 1969. At that time, John DiDomenico and three other men were taken before Judge Campbell where an Assistant United States Attorney moved the Court to grant DiDomenico and the others immunity pursuant to 18 U.S.C. 2514 (R. 6, p. 2, A. 6).

At that time, DiDomenico was given a poor quality carbon copy of the Government's Petition for immunity. *However, the copy served upon DiDomenico did not contain a copy of the letter from Will Wilson, Assistant Attorney General purporting to give the Attorney General's approval of the petition for immunity as is required by 18 U.S.C. 2514.*

The Court is referred to the case of *In Re Bart,* D.C. Cir., 304 F.2d 631. In that case, which is greatly similar to the case at bar, the orders of immunity and incarceration were vacated. In that case, as in the case at bar, the Government failed to properly serve the defendant with the petition seeking immunity (the letter from the Attorney General was missing). The Court said at 304 F.2d 637:

> "Normally, the application and supporting documents should be served in accordance with the Rules."

No cause or showing was made by the Government in this case to vary from the rules of procedure. It must be concluded that the defendant was denied the due process to which he is constitutionally entitled.

Further, John DiDomenico was not represented by counsel during this proceedings and was not given any effective opportunity to be heard. He did not even see the transcript of his appearance before the grand jury so that he would know what questions he was being given immunity on.

In this atmosphere of rush and of denial to John DiDomenico of orderly and due process with complete and fair notice, Judge Campbell purportedly granted John DiDomenico "immunity".

DiDomenico was returned to the grand jury where he again invoked his privilege against self-incrimination.

DiDomenico was then taken back before Judge Campbell where the Assistant United States Attorney orally moved that DiDomenico be held in contempt. No written petition or motion was filed or served. Further, the questions asked of DiDomenico were not certified and presented to

the Court, and John DiDomenico was not afforded an opportunity to examine a transcript of the questions. The Court did not issue a rule to show cause nor was there any other written charge ever filed or served.

Further, DiDomenico was not allowed to defend nor be heard in answer to the charge of contempt, nor was he afforded an opportunity to have assistance of counsel, although he requested such assistance (R. 6, pp. 7-8, A. 20-21).

Although it has been contended by the Government that this proceeding is civil, it is argued that where a man loses his liberty for more than six months, the rights to notice, to defend, and to have counsel, cannot be swept away by labeling an action "civil".

As said in *O'Connell* v. *United States*, 40 F.2d 201, 203, quoting from *Cooke* v. *United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

It might be noted that the entire procedure of granting immunity, appearing before the Grand Jury, returning to Court, being found in contempt, and being incarcerated, took less than one hour.

The Supreme Court stated in *Grannis* v. *Ordean*, 234 U.S. 385, 394; 58 L.Ed. 1363, 1368, 34 S.Ct. 779:

> "Against this interest of the State, we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that the fundamental requisite of due process of law is the opportunity to be heard."

And in *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed 2d 527, 549:

> "Notice, to comply with due process requirements must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

And at 18 L.Ed. 2d 542:

> "Due process of law is the primary and indispensable foundation of individual freedoms; it is basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise."

And from Judge Harlan's concurring opinion at 18 L.Ed. 2d, 571-572:

> "The Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding. See *E. G. Roller* v. *Holly*, 176 U.S. 398, 409, 44 L.Ed. 520, 524, 20 S.Ct. 410; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424, 59 L.Ed. 1027, 1031, 35 S.Ct. 625. Notice is ordinarily the pre-requisite to effective assertion of any Constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the favor or grace of State authorities. *Central of Georgia Railroad* v. *Wright*, 207 U.S. 127, 138, 52 L.Ed. 134, 142, 28 S.Ct. 47; *Coe* v. *Armour Fertilizer Works*, supra, 237 U.S. at 425, 59 L.Ed. at 1032."

And as Justice Douglas said in *United States* v. *Carroll*, 345 U.S. 457, 97 L.Ed. 1147, 1152, 73 S.Ct. 757:

> "But at the same time, every citizen is entitled to fair warning."

It is lastly pointed out to the Court that as was stated in *In Re Bart*, D.C. Cir., 304 F.2d 631, 637, the sole purpose of the presentation before a judge is to afford the witness an opportunity to point out formal defects. Not allowing this opportunity by failure in service, the defendant is denied due process.

It is submitted that the summary procedure followed by the District Court in this cause denied John DiDomenico due process of law as that is contained in the Fifth Amendment to the Constitution and made applicable to the United States.

II.

THE ORDER PURPORTING TO GRANT JOHN DI DOMENICO IMMUNITY WAS NOT VALID SINCE IT WAS NOT VALIDLY AUTHORIZED BY THE ATTORNEY GENERAL AS REQUIRED BY STATUTE.

It is submitted that the order purporting to grant immunity to John DiDomenico under 18 U.S.C. 2514 was illegal and invalid and thus not a lawful order of the Court of which John DiDomenico could be in contempt.

Section 2514 of Title 18 U.S.C. in pertinent part provides:

> "Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation

> of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, *upon the approval of the Attorney General,* shall make application to the Court. . . ." (Emphasis added)

A clear reading of the above language shows that before a valid application for immunity may be made, *approval from the Attorney General is necessary.* This necessary element does not exist in this case.

There is obviously necessarily required a determination that the testimony is necessary to the public interest. This of necessity requires the determination and discretion of the person to whom the decision is empowered. Congress delegated the power to authorize the application for immunity under section 2514 of Title 18 U.S.C. to the Attorney General.

> ". . . the general principle of law is that a delegate cannot delegate, 'delegatus non potest delegare', that is, 'the person to whom an office or duty is delegated cannot lawfully devolve the duty on another unless he be expressly authorized so to do.' Black's Law Dictionary, 3rd Ed.; *Shankland* v. *Mayor of Washington,* 5 Pet. 390, 8 L.Ed. 166, 26 C.J.S. Deputy, p. 978."
>
> (*Black* v. *Allen, et al,* 221 N.C. 445, 20 S.E. 2d 552, 554)
>
> "The general rule under the maxum 'delegatus non potest delegare' is that a delegated power, when made subject to the delegatee's judgment or discretion is purely personal and may not be further delegated in the absence of express statutory authorization '*Morton Bros.* v. *Pacific Coast Steamship Company,* 122 Cal.

352, 353-355, 55 P. 1; *Webster* v. *Board of Education,* 140 Cal. 331, 332, 73 P. 1070; *Shreveport Engraving Co.* v. *United States,* (1944, 5th Cir.) 143 F.2d 222, 226). Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature.' ''

(*Schector* v. *County of Los Angeles,* 65 Cal. Rptr. 739, 742; 258 C.A. 2d 391)

Clearly, the duty or power to approve applications for immunity under 18 U.S.C. 2514 was given to *the Attorney General* personally. This becomes even more clear when one examines 18 U.S.C. 2516 which provides for authorization for eavesdropping and which statute is part of the same series of statutes as is 18 U.S.C. 2514, and which was made law at the same time. 18 U.S.C. 2516 specifically authorizes the Attorney General to delegate his authority to a specific Assistant Attorney General.

18 U.S.C. 2516 in pertinent part:

''§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, *or any Assistant Attorney General specially designated by the Attorney General,* may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

* * * ''

(Emphasis added)

Congress was obviously well aware of the law of delegation of power and clearly desired only the Attorney General himself to authorize applications for immunity. In other words, the power to authorize applications for immunity is a non-delegable power of the Attorney General.

Yet, the only authorization for the application for immunity in this case is a letter from Assistant Attorney General Will Wilson (R. 3, A. 3). Thus, it must be held that there is no authorization from the Attorney General in this case and therefore the order purporting to grant John DiDomenico immunity is invalid and unlawful and not an order for which one can be held in contempt.

The Government answered this argument in the Court of Appeals on Application for Bail by filing a copy of a delegation of authority signed by Ramsey Clark on November 4, 1968, purporting to delegate his authority under 18 U.S.C. 2514 to the Assistant Attorney General in charge of the criminal division. Even if the Court should come to the conclusion that the Attorney General can delegate his authority under 18 U.S.C. 2514, it must be remembered that Ramsey Clark is not the Attorney General. There is no showing that John Mitchell, the present Attorney General, has made any such delegation. It is argued that even if a valid delegation can be made, it is personal, and the delegation is void upon the removal from office of the delegating official.

It must further be remembered that immunity statutes are in derogation of the right to remain silent guaranteed under the Fifth Amendment to the Constitution and the right to privacy under the Ninth Amendment, and thus must be construed strictly.

It must be remembered that the government made no proof of delegation of authority in the trial court when this issue was raised, and thus they did not meet their burden (R. 11, pp. 4-7, A. 6).

No authorization for the immunity having come from the Attorney General, the order of Judge Campbell purporting to grant John DiDomenico immunity was unlawful and invalid, and therefore John DiDomenico could not be in contempt in invoking his privilege and right to remain silent.

It is further pointed out that the authority or power given the Attorney General in 18 U.S.C. 2514 is one which requires the use of reason and discretion; such power cannot be further delegated. It is further noted that only men use reason and discretion, not offices. Therefore, a delegation of authority requiring discretion in its exercise, to an office, would be meaningless.

The Court's attention is again called to the case of *In Re Bart*, D.C. Cir., 304 F.2d 631, 637, which held that a grant of immunity under 18 U.S.C. 3486(c), (a statute very similar to 18 U.S.C. 2514 in language), could only be valid based upon a sworn or verified petition. The petition for immunity in the instant case was unsworn and therefore fails to meet the test.

In other words, Judge Campbell was merely acting as a rubber stamp for the United States Attorney without the proper facts being presented to him.

III.

18 U.S.C. 2514 IS UNCONSTITUTIONAL

18 U.S.C. 2514, the Statute under which John DiDomenico was purportedly granted immunity, is invalid because it violates the First, Fifth, Ninth and Tenth Amendments, and Article V of the Constitution of the United States.

There is no authority in the Constitution for the Congress to abridge the right to silence as contained in the First, Fifth and Ninth Amendments. Any authority there might be is reserved to the states in the Tenth Amendment.

It is argued that by authorizing the grant of immunity so to force one to speak or testify, Congress in effect legislated in derogation of the Constitution and attempted to amend the Constitutional provisions of the First, Fifth and Ninth Amendments without following the provision of Article V of the Constitution. The First Amendment guarantees the right of freedom of speech which contains therein the right to silence. The Fifth Amendment prohibits any compulsion of testimony of a self-incriminatory nature, and the Ninth Amendment guarantees the right to privacy. By authorizing a method to compel testimony in passing 18 U.S.C. 2514, the Congress has thus attempted to amend the Constitution without ratification of three-fourths of the States as is required, and thus 18 U.S.C. 2514 must be invalid.

The Section being invalid, John DiDomenico cannot be in contempt of an "order" issued under authority of that statute.

As Edward Bennett Williams wrote (Williams, *One Man's Freedom*, Atheneum, New York, 1962, p. 144):

> "The right to silence is more than the mere right to refuse to answer incriminating questions. It is the respect which society pays to the inviolability of each man's soul in an era when hypnotism, narco-analysis, truth serums, lie detectors and other scientific devices are being used to force the revelation of truths by persons who desire to keep them secret. The right should not be cast aside as a device exploited by hoodlums,

for it is a last bastion against an ever more omnipotent government. It is the final shield against invasion of the soul. Protection from this kind of assault is the *sine qua non* of the essential dignity of man.

"The freedom of the individual as we have known it since the birth of this nation will be at an end if the time ever comes when the state can confront the suspected person with conviction if he confesses guilt, perjury if he denies it and contempt if he stands silent."

If the incarceration of John DiDomenico is upheld, the day Williams foresaw, has come.

IV.

JOHN DI DOMENICO WAS DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL.

John DiDomenico was denied his right to assistance of counsel. When he was brought before Judge Campbell and for the first time heard that he might be going to jail, he requested the Court to allow him some time to seek counsel. (Although he had spoken to his family lawyer via telephone from Florida prior to returning to Chicago to appear before the Grand Jury, he had not consulted any attorney regarding his appearance before the Grand Jury and was not represented by any attorney during that time nor when he appeared in Court.)

John DiDomenico's request to be allowed to get an attorney was denied with the curt response that he may consult counsel from the Marshal's lockup (R. 6, p. 8). As a result, John DiDomenico was incarcerated for an indefinite period of time (possibly more than ten months, since the December, 1968 Grand Jury life extends to June, 1970, by rule; at the date this petition is filed he has been incarcerated more than six months.

To suffer such imprisonment without benefit of counsel or the opportunity to defend is certainly violative of the Fifth and Sixth Amendments to the Constitution, and any reasonable notion of fair play and the appearance of justice.

V.

JOHN DI DOMENICO IS BEING PUNITIVELY IMPRISONED IN EXCESS OF SIX MONTHS WITHOUT BENEFIT OF TRIAL BY JURY, CHARGE BY INDICTMENT, AND IS SUFFERING CRUEL AND UNUSUAL PUNISHMENT, ALL CONTRARY TO THE CONSTITUTION.

John DiDomenico was subpoenaed to appear before the December, 1968 Grand Jury to testify in the "investigation of possible violations of 18 U.S.C. 1952 by Jack Cerone, et al." (See letter of Will Wilson dated August 12, 1969, R. 3, A. 3.)

On August 19, 1969, subsequent to DiDomenico's appearance before that Grand Jury, the Grand Jury ended its investigation by returning indictment No. 69 CR 555 in the District Court for the Northern District of Illinois, Eastern Division, charging Jack Cerone and five other persons with violations of 18 U.S.C. 1952. Since that date, the December, 1968 Grand Jury has not met, has not heard evidence, and has not issued subpoenaes.

It is to be noted that at oral argument in the Court of Appeals, the Assistant United States Attorney appearing for the government admitted that the December, 1968 Grand Jury has not met since August 19, 1969, the date it returned its indictment in the investigation in which the defendant was subpoenaed. It is thus conclusive, that the Grand Jury's investigation is concluded and that it is being kept alive merely to incarcerate the defendant.

The United States Supreme Court has held that the use of grand jury process without intending to obtain indictments after the termination of the investigation "would be flouting the policy of the law". (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683, 2 L.Ed. 2d 1077, 1082.) Also see *United States* v. *Procter & Gamble Company*, D.C.N.J., 175 F.Supp. 198; *In re National Window Glass Workers*, 287 F.219; and *In Re April*, 1956 *Term Grand Jury*, 7 Cir., 239 F.2d 263.

It is suggested that the December, 1968 Grand Jury has ended its investigation and is being maintained technically alive, purely for the purpose of punishing John DiDomenico. It is thus argued that John DiDomenico is being punitively imprisoned rather than suffering any "civil" or "coercive" imprisonment.

Imprisonment of this type, in excess of six months, without the benefit of trial by jury (*Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522, 88 S.Ct. 1477), and without benefit of indictment by a grand jury (*Costello* v. *United States*, 350 U.S. 359, 362; *Stirone* v. *United States*, 361 U.S. 212, 215; *United States* v. *Consolidated Laundries*, S.D. N.Y., 159 F.Supp. 860, 866) is contrary to the Fifth and Sixth Amendments to the Constitution of the United States. It might be noted that there is a conflict between circuits in the procedures followed. In at least one circuit, the Sixth Circuit, the prosecution seeks and obtains indictments in contempt matters and provides the defendant with all of the Constitutional rights attendant to an indicted person (*United States* v. *Sternman*, 6 Cir., 415 F.2d 1165).

It is further argued that incarceration of John DiDomenico, a 49-year old, $70 a week file clerk who suffers from high blood pressure, ulcers, and other ailments, in the

infamous Cook County Jail, amounts to cruel and unusual punishment contrary to the Eighth Amendment to the Constitution of the United States.

It is thus suggested that the method by which John DiDomenico has been imprisoned results from a scheme to deprive him of due process, a fair trial, the right to trial by jury, and the right to counsel.

It might be remembered that the life of the grand jury is determined by Rule 6, Federal Rules of Criminal Procedure.

Rule 6(g), F.R.Cr.P. provides:

> "A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. * * *"

This rule changed the previous law, 28 U.S.C. former § 421 which provided that a grand jury served for its term unless specifically extended for a specifically described investigation.

It might be noted that this rule went into effect without action of the Congress and was never subject to Presidential veto. Thus, the provision which has now allowed imprisonment of John DiDomenico for more than six months and possibly in excess of ten months, was not Constitutionally enacted. (See: "*A Presidential Legal Opinion*" by Associate Justice Robert H. Jackson, Harvard Law Review, Volume 66, Number 8, June, 1953, page 1353.)

It is further suggested that the length of sentence or effective punishment in this case was at the whim of the prosecutor, since he alone determined when he would seek the petitioner's imprisonment. Thus, the ordinary judicial and legislative safeguards in determining punishment

have been by-passed. It is suggested that this Court should review this issue and determine whether it stands the test of Constitutional standards.

It might be noted that recently, the Senate, after observing the evasion of this Court's requirement of jury trial in contempt proceedings where more than six months' imprisonment is involved, has now passed and sent to the House a bill providing for extension of grand juries up to three years (Senate Bill 30).

It is argued that the order of incarceration must be reversed.

CONCLUSION

Erwin Griswold, the Dean of Harvard Law School and now Solicitor General of the United States, wrote:

> "If a man has done wrong, he should be punished. But the evidence against him should be produced and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment, such as imprisonment for contempt, should be used to compel him to provide the evidence to accuse or to convict himself."
>
> Griswold, *The Fifth Amendment Today*, Cambridge, Mass., Harvard University Press, 1958, pp. 7-8)

For the foregoing reasons, the Petitioner prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Chicago, Illinois 60603
312-332-7374
Attorney for Petitioner

February, 1970

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

No. 17869

IN RE DECEMBER 1968 GRAND JURY
JOHN DI DOMENICO,

Witness-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

JANUARY 20, 1970

Before SWYGERT, CUMMINGS and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal by John V. Di Domenico from an order of the district court holding him in contempt and incarcerating him until he answers questions propounded to him during a grand jury investigation.

The appellant was called to appear as a witness before the December 1968 Grand Jury for the Northern District of Illinois. The grand jury was charged to investigate interstate gambling transactions and possible violations of 18 U.S.C. §§ 1084, 1952. Di Domenico appeared as required on August 13, 1969, but refused to testify, asserting his privilege against self-incrimination. On the following day the United States Attorney petitioned the district court, pursuant to section 2514 of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2514, for an order requiring appellant to testify and granting him immunity.

Before granting immunity, the court explained to Di Domenico and other witnesses, who were represented by counsel, the consequences of such a grant, stating that no prosecution could be commenced in any jurisdiction involving any matter or transaction about which they testified before the grand jury. Appellant was then granted immunity by the court and ordered to return to the grand jury and to answer all questions put to him. The court further explained to appellant that he was entitled to consult counsel prior to his appearance before the grand jury.[1] Di Domenico failed to request counsel at that time, but acknowledged that he understood the immunity procedure and the court's order.

The appellant immediately returned to the grand jury, but again refused to testify on the basis of his right against self-incrimination. Upon his refusal to testify the

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[1] The record indicates that the appellant was represented by an attorney prior to his being notified to apear before the grand jury on August 13, 1969 and that after he was adjudged in contempt and incarcerated he obtained the services of his present attorney, Carl Walsh, to represent him.

grand jury ordered Di Domenico again to appear before Chief Judge Campbell, who previously had granted appellant immunity and ordered him to testify. Di Domenico returned to the district court where the United States Attorney petitioned the court to cite appellant for contempt. The questions which Di Domenico refused to answer were read to him and the court admonished him that if he persisted in his refusal, the court would jail him until he chose to purge himself of his contempt and answer the questions. The appellant responded with a request to confer with an attorney. Noting that the appellant had been given ample opportunity to consult with counsel before returning to the grand jury, the court denied his request. When Di Domenico again refused to answer questions and asserted that he would continue to claim his privilege against self-incrimination, the court adjudged him in contempt and committed him to the marshal's custody.

The appellant presents several arguments in support of his contention that he is being deprived of his liberty without due process. Most of these arguments merit only summary discussion. The appellant claims that he did not receive a copy of the letter from the Attorney General approving the Government's petition for an order of immunity and that the petition for immunity which was served upon appellant was a poor copy of the original. It is apparent from the record, however, that the letter and the original petition for immunity were filed with the clerk of the court and were available to the appellant if he wished to see them. Di Domenico further argues that the questions which he refused to answer were not certified to the district court and that he was denied an opportunity to answer the contempt citation. The record demonstrates that, even though the questions were not formally certified, they were read to the appellant. We

think Di Domenico was given ample opportunity to purge himself of contempt at this point and that this constitutes a sufficient answer to the contempt citation.

We believe that appellant's contention that he was denied the assistance of counsel is also unsupported by the record. When the court granted him immunity, appellant was informed of his right to confer with counsel in advance of his appearance before the grand jury. His eleventh-hour request for counsel after he was adjudged in contempt of the court's order was properly denied. The record is devoid of evidence indicating that appellant was prevented from seeking the advice of counsel prior to that time and it is apparent that Di Domenico knowingly and deliberately chose not to be represented.

Appellant further contends that the order compelling him to testify is invalid since the letter authorizing immunity was signed by an Assistant Attorney General rather than the Attorney General. He refers to that part of section 2514 which provides that immunity shall be granted only "upon the approval of the Attorney General." However, 28 U.S.C. § 510 authorizes the Attorney General to delegate to any "employee . . . any function of the Attorney General." Pursuant to the provision on November 4, 1968 the then Attorney General Ramsey Clark delegated his authority under section 2514 to the Assistant Attorney General in charge of the Criminal Division. The letter of authorization in this case was signed by Assistant Attorney General Will Wilson of the Criminal Division. Di Domenico makes the additional argument that since the delegation of authority was not made by the present Attorney General, it is invalid. We disagree. The power to delegate authority provided in section 510 is made to the office of Attorney General and not to the individual holding that office.

The appellant contends that the court's order is invalid since the statute granting immunity is unconstitutional. Statutes similar to the one here have withstood attacks of a like nature. The Immunity Act of 1954, 18 U.S.C. § 3486, was upheld by the Supreme Court in *Ullman* v. *United States*, 350 U.S. 423 (1956). An earlier statute was upheld in *Brown* v. *Walker*, 161 U.S. 591 (1896). More recently, the Ninth Circuit held that it could find no constitutional defect in section 2514, *Carter* v. *United States*, (No. 24554, 9th Cir. Oct. 9, 1969). We think these cases adequately dispose of the appellant's contention.

Finally, the appellant contends that he is being punitively imprisoned since the grand jury has ended its investigation of "possible violations of 18 U.S.C. 1952 by Jack Cerone, et al.". On August 19, 1969 the grand jury returned an indictment charging Jack Cerone and five others with violations of 18 U.S.C. § 1952 and has not met since that time. There is nothing in the record to show that only those indicted were under investigation by the grand jury. In fact, it must be assumed, until the contrary is shown, that the grand jury is continuing its existence for the very purpose of obtaining appellant's testimony which may implicate others. At oral argument, Government counsel advised us that the grand jury is still investigating interstate gambling, thus justifying the continuing detention of appellant.

The order appealed from is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 1203

In the Supreme Court of the United States

OCTOBER TERM, 1969

IN RE DECEMBER 1968 GRAND JURY,
JOHN DI DOMENICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
JEROME M. FEIT,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1970. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures resulting in the finding of civil contempt in this case denied petitioner due process or the right to counsel.

2. Whether the immunity statute here involved, 18 U.S.C. 2514, is constitutional.

3. Whether petitioner may validly be imprisoned for civil contempt for a period of more than six months.

STATUTES INVOLVED

18 U.S.C. 2514 (Supp. IV) provides:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violated this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in

> any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

28 U.S.C. 510 (Supp. IV) provides:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

STATEMENT

Petitioner was adjudged to be in civil contempt in the United States District Court for the Northern District of Illinois, based upon his refusal to give testimony before a grand jury, despite the granting of immunity under 18 U.S.C. 2514 (Supp. IV) (App. 22).[1] The order was affirmed by the court of appeals (Pet. App. 1–5). Application for bail was denied by the court of appeals and thereafter by the Circuit Justice. Petitioner is presently confined in the Cook County Jail.

At 11 a.m. on August 13, 1969, petitioner appeared before the December 1968 grand jury of the Northern District of Illinois. In refusing to answer all questions put to him, he invoked the privilege against self-incrimination. The following day, August 14, petitioner and three other persons who had also invoked the privilege before the grand jury were brought

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[1] "App." refers to petitioner's appendix in the court below, "Pet. App." to the appendix to the petition for certiorari.

before the district court for a grant of immunity under 18 U.S.C. 2514. Government counsel advised the court that the designated representative of the Attorney General, the Assistant Attorney General for the Criminal Division, had approved an application to the court that the witnesses be instructed to testify subject to the provisions of 18 U.S.C. 2514, granting them immunity. The foreman of the grand jury stated that the grand jury joined in this request (App. 6–8). An attorney appeared in behalf of the other three witnesses, but no counsel was present for petitioner (App. 8–14). The court stated that the grant of immunity extended to any prosecution in any court. It explained the procedures to be followed: if immunity were granted, the witnesses would be instructed to return and testify; if they again refused, there would then be a hearing; and "they are entitled to counsel prior to their testimony before the Grand Jury if immunity is granted" (App. 9). After hearing the attorney for the other three witnesses (App. 9–15), the court directed each of the witnesses, including petitioner, to step forward. It explained that pursuant to statute "the Attorney General has authorized and the statute enacted by Congress now gives you complete and absolute immunity from prosecution resulting from any answers to any questions that you may give to this Grand Jury here present" (except, as the judge explained, for perjury) (App. 15–16). The judge then ordered the witnesses to return to the grand jury and "fully and completely answer any and all questions which this Grand Jury or its representatives before it may propound to you" (App. 16). Each witness was

individually asked if he understood the court's order and each, including petitioner, said yes (App. 16).

Petitioner then returned to the grand jury room but again refused to testify.[2] He was immediately returned to the district court. The Clerk recited that this was a "petition to cite John V. DiDomenico for civil contempt of court for failure to obey the Court's order to testify" (App. 16). Government counsel then explained what had occurred before the grand jury, and the transcript of that appearance—including the questions which were asked of petitioner and which he had refused to answer under a claim of privilege—was read in open court (App. 18–20). The district court told petitioner that if he persisted in his refusal to answer these questions, it would have no alternative but to commit him to custody until he did answer (App. 20). Petitioner replied that, although he had earlier been advised that he could secure an attorney he had not then felt that he needed one, but that he now felt that he must confer with an attorney (App. 20–21). The court pointed out that petitioner had been given full opportunity to consult with an attorney, that he had failed to exercise such opportunity, and that the procedures—including the grant of immunity—had been fully explained to him. The court stated that unless petitioner returned and answered the grand jury's inquiries, it would not delay his commitment, but that he could confer with counsel while he was in the custody of the marshal. Petitioner was then

[2] The other three witnesses complied with the court's order and testified (App. 21).

asked if he would return to the grand jury and answer its questions, he replied that he would assert his privilege against self-incrimination (App. 20–21). The court then held him in contempt and committed him to the custody of the marshal, to be confined in jail until he chose to obey the court's order. The marshal was directed to afford petitioner full opportunity "to consult with any attorney that he wishes to call, * * *" (App. 21–22).

ARGUMENT

1. Petitioner was not denied due process in these proceedings. The substance of the immunity granted to him was fully explained by the district court, and petitioner admittedly understood his rights and what was required of him (App. 7–8, 15–16).[3] It is not significant that petitioner was not furnished a copy of the transcript of his questions before the grand jury and his answers thereto. The grand jury reporter, under oath, read these questions and answers to him in open court. It is not claimed that petitioner failed to understand the questions. Moreover, the statute does not require that a transcript be furnished. The further contention that petitioner was denied counsel is negated by his own admission that he had been advised of his right to counsel but declined to exercise it (App. 20–21). In addition, any

[3] We note, moreover, that a copy of the petition for the order of immunity (App. 1–2) was presented to petitioner, although he now complains that it was a "poor quality carbon copy" (Pet. 12).

defect in petitioner's original commitment by reason of the absence of counsel was fully cured four days later upon petitioner's motion, presented by counsel, to vacate the order, which the district court denied (App. 22–23).

2. As the court of appeals held, immunity statutes like 18 U.S.C. 2514 have been upheld as constitutionally valid. See *Ullmann* v. *United States*, 350 U.S. 422; *Brown* v. *Walker*, 161 U.S. 591. In *Carter* v. *United States*, 417 F. 2d 384, petition for certiorari pending, No. 1399 Misc., this Term, the Ninth Circuit found the instant statute to be a valid exercise of congressional authority and a fully effective protection of Fifth Amendment rights.

The Attorney General is specifically empowered by 28 U.S.C. (Supp. IV) 510, *supra* p. 3, to make such provisions as he considers appropriate authorizing the performance of the functions of the Attorney General by other officers of the Department of Justice. The fact that the Attorney General who made the delegation of authority to the Assistant Attorney General to approve applications for immunity is no longer in office is not significant. As the court of appeals pointed out (Pet. App. 4), this power to delegate authority "is made to the office of Attorney General and not to the individual holding that office."

3. Petitioner's confinement is remedial, not punitive. The fact that petitioner, by his own obduracy, has remained in confinement for a period of more than six months does not transform the proceeding for his commitment into a criminal action requiring a jury trial, nor does it convert his continued confine-

ment into cruel and unusual punishment. Petitioner can regain his liberty as soon as he complies with the proper and lawful order of the court. *Shillitani* v. *United States,* 384 U.S. 364; *Bloom* v. *Illinois,* 391 U.S. 194, 209; *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590; *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 449.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

MARCH 1970.

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